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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85 - 736

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,

v.

JOSEPH THOMAS,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Joseph M. Nursey
Millard C. Farmer
P.O. Box 1978
Atlanta, GA 30301
(404) 688-8116

COUNSEL FOR
JOSEPH THOMAS

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY DETERMINED THAT A FRANCIS v. FRANKLIN, 471 U.S. ___, 105 S.Ct. 1965 (1985) VIOLATION OCCURRED AT RESPONDENT'S TRIAL AND THAT THIS ERROR WAS NOT HARMLESS.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE

In January, 1977, Respondent, Joseph Thomas, was convicted of murder, kidnapping and armed robbery in the Superior Court of Decatur County, Georgia and sentenced to death. On direct appeal, the Supreme Court of Georgia affirmed the convictions and sentences for murder and kidnapping but vacated the armed robbery conviction. Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1977), cert. denied, 436 U.S. 914 (1978).

After exhausting state remedies, Respondent filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia, Thomasville Division. This petition was denied on July 17, 1981. On appeal, the United States Court of Appeals for the Eleventh Circuit remanded the

case to the district court for a limited evidentiary hearing. Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983).

On remand, the district court denied the petition.

On July 8, 1985, the Eleventh Circuit reversed the judgment of the district court and remanded the case with instructions to grant the Writ of Habeas Corpus. Thomas v. Kemp, 766 F.2d 452 (11th Cir. 1985). That court denied rehearing en banc on September 12, 1985.

The State filed a petition for writ of certiorari on October 30, 1985.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The Court of Appeals correctly held that the trial court's instructions to the jury at the guilt/innocence phase of Joseph Thomas' trial improperly shifted the burden of proof on the essential element of intent. The trial court instructed the jury on the essential element of intent as follows:

> A crime is a violation of a statute of this State in which there shall be a union or joint operation of act or emotion [sic] to act, an intention or criminal negligence. The acts of a person of sound mind and discretion are presumed to be a product of the person's will, but that the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but this presumption may be rebutted.
>
> A person will not be presumed to act with criminal intent, but the trial facts [sic], and you are the trier of facts in this case, may find such intention upon considering the words and conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted. Every person is assumed to be of sound mind and discretion. But the presumption may be rebutted. A specific intent to commit the crime charged in each of these indictments, in each count thereof, is an essential element that the State must prove beyond a reasonable doubt and to the exclusion of every other reasonable

> hypothesis. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. The intent may be shown in many ways, provided the jury find beyond a reasonable doubt that it existed from the evidence produced before you.
>
> (T Trial Vol. 4 at 79-80) (emphasis added).

Thomas v. Kemp, 766 F.2d at 454-455.

This instruction is virtually identical to the instruction which this Court found to be unconstitutionally burden-shifting in Francis v. Franklin, 471 U.S. ___, 105 S.Ct. 1965 (1985). As Judge Roney, writing for the panel, correctly held:

> The State argues that any constitutional infirmity in the above instructions was cured by the general instructions that the defendant is presumed innocent and that the State bears the burden of proof to prove each element beyond a reasonable doubt. Such an argument is foreclosed by Franklin v. Francis, ___ U.S. at ___, 105 S.Ct. at 1974. Neither is the defect corrected by the more specific instruction that '[a] person will not be presumed to act with criminal intent, but the [trier of] facts, and you are the trier of facts in this case, may find such intention upon considering the words and conduct, demanor, motive and all other circumstances connected with the act for which the accused is prosecuted.' See Francis v. Franklin, ___ U.S. at ___, 105 S.Ct. at 1974-1976; Drake v. Kemp, 762 F.2d at 1453; Tucker v. Kemp, 762 F.2d at 1501; Davis v. Kemp, 752 F.2d at 1517-19.
>
> A review of the entire jury charge in light of Francis v. Franklin and this Court's en banc decisions compels the conclusion that Thomas' jury instruction violates Sandstrom v. Montana, 442 U.S. 510 (1979).
>
> Thomas v. Kemp, 766 F.2d at 455.

The State argues in its petition for writ of certiorari that this Court has expressly left open the question of whether a Sandstrom v. Montana, 442 U.S. 510 (1979) error can ever be harmless under the Chapman v. California, 386 U.S. 18 (1967) harmless error rule. (Petitioner's Petition for Writ of Certiorari at p. 5). While this may be correct, it is not relevant to the disposition of this case.

The Eleventh Circuit, in its decision in this case, conducted a harmless error analysis and determined that the Sandstrom - Franklin error was not harmless in Joseph Thomas' case. Thomas v. Kemp, 766 F.2d at 455-456. Therefore, whether or not the harmless error rule can ever be applied to Sandstrom error, the result of Joseph Thomas' case would remain the same.

CONCLUSION

Respondent, Joseph Thomas, for the reasons stated above, prays that the Warden's petition for writ of certiorari be denied.

Respectfully submitted,

Joseph M. Nursey
Millard C. Farmer
COUNSEL FOR RESPONDENT

P.O. Box 1978
Atlanta, GA 30301
(404) 688-8116

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgi. 30334.

This 27th day of November, 1985.

Joseph M. Nursey
COUNSEL FOR PETITIONER

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116